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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2059

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners American Electric Power Company, Inc., American Electric Power Service Corporation, and Indiana & Michigan Electric Company respectfully pray that a Writ of Certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Seventh Circuit entered in this action on February 21, 1980, and to review the Order and Judgment of the United States Court of Appeals for the Seventh Circuit entered at an earlier stage of this action on August 16, 1977.

Opinions Below

The February 21, 1980 Opinion of the Court of Appeals, 616 F.2d 976 (7th Cir. 1980) (*"Mishawaka II"*), is reproduced in the Appendix at 6a-37a. The January 30, 1979 Memorandum Opinion of the District Court, 465 F. Supp. 1320 (D. Ind. 1979), is reproduced at 47a-104a.

The August 16, 1977 Opinion of the Court of Appeals, 560 F.2d 1314 (7th Cir. 1977), *cert. denied,* 436 U.S. 922 (1978) (*"Mishawaka I"*), is reproduced at 157a-178a. The unreported Memorandum Opinion of the District Court issued May 1, 1975 is reproduced at 180a-199a.

Jurisdiction

The Order and Judgment of the Court of Appeals were filed on February 21, 1980. Petitioners' timely application for rehearing and suggestion for in banc consideration was denied on March 31, 1980. This Petition for a Writ of Certiorari is filed within 90 days of March 31, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Does not the First Amendment right of petition under the *Noerr-Pennington* doctrine preclude the imposition of Sherman Act liability where such liability is predicated, in whole or in part, upon petitions for rate relief to the Federal Energy Regulatory Commission (the "Federal Commission") and where it has been found that the petitions for rate relief sought no more than the utility believed it could justify under the applicable statutes and regulations and were, therefore, not sham?

2. In light of this Court's decisions in cases such as *Gordon, National Association of Securities Dealers* and *Otter Tail,** does not the pervasive regulation of electric utility rates under the Federal Power Act confer exclusive jurisdiction over those rates upon the Federal Commission, and effect an implied repeal of the antitrust laws to the extent that the level and collection of those rates are the foundation of the antitrust claims?

3. Where, under the Federal Power Act, an electric utility files a petition for rate relief and collects the requested rate during the pendency of the federal rate-making proceedings subject to the Federal Commission's power to order a refund with interest:

   A. Is not the statutory refund under the Federal Power Act the exclusive remedy for any difference between the rate requested (and collected subject to refund) and the rate ultimately found to be just and reasonable by the Federal Commission?

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* *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975); *United States* v. *National Ass'n of Securities Dealers, Inc.,* 422 U.S. 694 (1975); *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973).

B. Did not the court below err in holding that the amount of any statutory refund (or the district court's estimate thereof) is a "monopolistic overcharge" giving rise to liability under Section 2 of the Sherman Act?

C. May a federal court predicate antitrust injury on the assumption that there will be such a "monopolistic overcharge", prior to a determination of the just and reasonable rate by the Federal Commission in the regulatory proceeding?

D. Does not judicial interference in the rate-making process alter the congressionally determined balance between the interest of the customer in a just and reasonable rate and the interest of the public in the financial stability of public utilities?

4. May an electric utility which is subject both to federal regulation over the rates it charges municipal distribution systems, and to independent and inconsistent state regulation over the rates it charges its industrial customers, be held liable under Section 2 of the Sherman Act for creating a "price squeeze" between such rates, where:

A. In accordance with the Federal Power Act, the federal rate was collected, subject to refund, following the filing of petitions for such rates, which were supported by cost-of-service studies and which, as the antitrust court found, sought rates no higher than the utility believed it could justify under the applicable statutes and regulations;

B. It has been found that there was "no suggestion" that the utility had artifically depressed its state-regulated rates to create any "price squeeze";

C. It has been found not only that the difference between the federally-regulated and state-regulated rates was substantially attributable to the action of the State Commissions in reducing the rates sought by the utility, but also that the federal and state regulatory schemes are so diverse and inconsistent that any expectation of parity between the resulting rates is "totally without foundation";

D. At the time the antitrust court entered its judgment of liability, the Federal Commission had not yet determined either (i) the extent, if any, to which the federal rate collected subject to refund exceeded the just and reasonable rate or (ii) the validity of the "price squeeze" allegations raised in the federal regulatory proceeding?

5. Does not the "state action" doctrine protect an electric utility from "price squeeze" liability under Section 2 of the Sherman Act where it has been found that the difference between its federally-regulated rates and its state-regulated rates was attributable to the action of state agencies in reducing the rates sought by the utility and to the inconsistent bases on which the federal and state rates are determined?

6. Did not the Seventh Circuit's opinion in *Mishawaka II* erroneously construe Section 205 of the Federal Power Act and this Court's opinion in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), as:

A. Authorizing the federal courts in antitrust litigation to speculate as to how the Federal Commission may ultimately exercise its jurisdiction to determine the level of rates and to rule upon "price squeeze" allegations; and

B. Imposing a prior restraint on utilities to limit their applications for federal rate increases to the level of rates previously allowed by state agencies, thus inhibiting the freedom of a utility to petition for the rates it believes it can justify and at the same time frustrating the Federal Commission's exercise of jurisdiction over federal rate levels and price squeeze allegations?

7. Does not *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), preclude the allowance as antitrust treble damages of litigation fees incurred by a party in bringing an undecided federal regulatory proceeding?

Constitutional and Statutory Provisions Involved

This petition raises issues which require an accommodation among (i) the First Amendment to the United States Constitution, (ii) Section 2 of the Sherman Act, 15 U.S.C. §2 (1976), and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26 (1976), and (iii) Sections 205 and 206(a) of the Federal Power Act, 16 U.S.C. §§824d (1976 and Supp. II 1978), 824e(a) (1976). These authorities are set forth in the Appendix hereto at 1a through 4a.

Statement of the Case

The jurisdiction of the district court was invoked under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26 (1976), for alleged violations of Section 2 of the Sherman Act, 15 U.S.C. §2 (1976).

A. Statement of Facts*

Indiana & Michigan Electric Company ("I&M") generates, transmits and sells electricity to industrial, commercial and residential customers, as well as to customers such as the respondent municipal electric distributors ("Municipalities") who resell electricity to ultimate users in their communities.** 202a-203a. The ten Municipalities purchase their electricity from I&M. 202a.

The electric rates charged by I&M are subject to regulation in three separate jurisdictions. 204a. I&M's rates to the Municipalities are regulated by the Federal Commission under the Federal Power Act. 204a. I&M's rates to its consumer customers are regulated under state law by the public service commissions of Michigan and Indiana (the "State Commissions"). 204a.

I&M may not charge any customer rates different from those reflected in its effective tariffs on file with the Federal or State Commissions (206a), and may not change its rates to any customer without filing a petition with the appropriate commission (205a). Congress provided that rate increases filed with the Federal Commission become effective not later than six (now seven) months after filing, subject to a refund, with interest, of any por-

* The facts set forth here are drawn exclusively from the Stipulation of Facts admitted in evidence by the trial court (and included in the Appendix to this Petition at 201a-319a) and from the findings and opinions rendered below.

** I&M is a subsidiary of Petitioner American Electric Power Company, Inc. ("AEP"), a public utility holding company. 203a. Petitioner American Electric Power Service Corporation, also an AEP subsidiary, provides management, professional and technical services to its parent, to I&M and to the other electric operating company subsidiaries of AEP. 203a.

tion of the rate sought which exceeds the rate found by the Federal Commission to be "just and reasonable." 205a-206a. I&M's state-regulated rates, however, do not become effective until after the State Commissions issue orders setting the levels of such rates. 206a.

I&M filed its first petition for a federal rate increase in 1972; its second in May 1976; and its third in May 1978. 211a. Each federal petition was preceded by at least one petition for rate relief in each state. 211a.

The federal proceeding arising out of the 1972 rate petition was settled among the parties in 1977, prior to any ruling by the Federal Commission. 217a. The federal proceeding arising out of the 1976 rate petition was pending before the Federal Commission at the time of the Court of Appeals decision in *Mishawaka II*. 11a. (On March 18, 1980, *after* the Court of Appeals decision in *Mishawaka II,* the Federal Commission determined the just and reasonable rate in the 1976 proceeding, but has yet to determine the "price squeeze" issues raised in that proceeding.) The proceeding arising out of the 1978 rate petition is still pending. 11a. Thus, at the time *Mishawaka II* was decided, the Federal Commission had not rendered a decision on the merits of any of I&M's petitions for rate increases.

There was no evidence, and there has been no finding, that I&M manipulated any of its rate filings. To the contrary, the district court found (120a) and the Court of Appeals affirmed (13a) that I&M's federal rate petitions sought the maximum rate relief that I&M believed it could justify under the applicable rules and regulations, and

that its petitions for rate increases were therefore not sham (13a). The Court of Appeals also found that there was "no suggestion" that I&M had artificially depressed its state-regulated petitions so as to create a "price squeeze" between federal and state regulated rates. 28a n.16.

B. History of the Case

In 1974, I&M moved on jurisdictional grounds for dismissal of the first of the several complaints subsequently consolidated in this action. That complaint alleged that the Municipalities could not compete with I&M for industrial customers because I&M had created a "price squeeze" between its federally-regulated rate charged to the Municipalities and its state-regulated rates to its industrial customers. After the district court's denial of that motion was affirmed by the Seventh Circuit in *Mishawaka I*, I&M petitioned this Court for a Writ of Certiorari. At the request of the Court, the Solicitor General presented the separate views of the Federal Commission and of the United States in a brief *amicus curiae*. That Petition, addressed solely to the pleadings, was denied on May 22, 1978. 436 U.S. 922 (1978).

This action went to trial in November 1978 under an amended and consolidated complaint. The district court rendered its Opinion, Findings and Conclusions on January 30, 1979.* The district court found a violation of Sec-

* The district court's Findings of Fact and Conclusions of Law were copied (in large measure, photocopied) from the proposed findings and conclusions submitted by counsel for the Municipalities. With some excisions and a handful of changes, the district court's opinion was a *verbatim* reprint of the post-trial brief submitted by counsel for the Municipalities. *See United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 n.4 (1964).

tion 2 of the Sherman Act, awarded treble damages in excess of $12 million and imposed injunctive relief. *Mishawaka II* affirmed the finding of Section 2 liability against Petitioners, explicitly relying upon the amalgamation of three activities, while conceding that no one of the activities would in itself have constituted a violation of Section 2. 24a. The activities on which the Seventh Circuit relied, each of which was subject to regulation, are:

1. I&M's filing of federal rate petitions. I&M was found to have collected "monopolistic overcharges" and to have charged federal rates that were higher (prior to any refund) than its state rates.

2. I&M's proposal of a curtailment plan during a 1974-75 shortage of generating capacity and its expressed desire at that time to withdraw ultimately from the market for the bulk sale of electricity.

3. I&M's acquisition of four municipal electric distribution systems between 1957 and 1966, prior to any of the acts by which the Municipalities claim to have been injured, and its lease of the Fort Wayne municipal electric distribution system in 1975.

There is no dispute that each of these activities is subject to regulation. I&M's federal rates are collected subject to refund pending the Federal Commission's determination of a just and reasonable rate that reflects, among other things, the relationship between federal and state rates. 206a. Any curtailment of service by I&M or withdrawal from the market for bulk sales would have required

prior approval of the Federal Commission. 22a. 18 C.F.R. §35.15 (1979). (It is not claimed that I&M made any application to withdraw service from the Municipalities; it is stipulated [248a] that I&M has never interrupted service to any of them.) Finally, each of the acquisitions and the lease transaction was approved by the voters of the affected municipality and each was determined by the appropriate regulatory agency to have been in the public interest. 23a.

Having affirmed on liability, the Seventh Circuit reversed and remanded the case to give the Municipalities a further opportunity to "establish their antitrust damages by proof of specific injuries they have suffered as a result of [I&M's] overcharges and other monopolistic practices" (30a), although the Municipalities have consistently argued that they cannot show damages in that fashion (25a, 249a-250a) and made no attempt to do so at trial.

The Seventh Circuit also directed the district court on remand to include as an item of treble damages the "expenses [the Municipalities] incurred in litigating" an unresolved Federal Commission proceeding commenced by them to press claims which are identical to the curtailment and "attempted withdrawal" claims asserted in this federal antitrust action. 31a. The Seventh Circuit also vacated and remanded the injunctions entered by the district court. 37a.

Mishawaka II is thus dispositive on liability and that controlling issue is now ripe for review by this Court.

Reasons for Granting the Writ

Mishawaka I and *Mishawaka II* are the first federal appellate court opinions to consider the application of Section 2 of the Sherman Act, in a federal court action, to the pervasively regulated rates charged by an electric utility. Numerous similar cases, alleging a "price squeeze" between a utility's federal and state regulated rates, are pending in district courts throughout the country;* a host of such allegations are before the Federal Commission.

The decisions below posited liability under the antitrust laws upon actions taken by a utility to invoke the regulatory jurisdiction of the Federal and State Commissions over its rates, notwithstanding that the utility's filings were not sham. Such an expansive construction of the antitrust laws subverts the regulatory scheme which Congress adopted in the Federal Power Act. It overturns principles of substantive antitrust law and federal antitrust jurisdiction which have been carefully developed by the Congress and by this Court. It erodes constitutional rights

* There are at least 10 other actions, presently pending in the district courts, which raise "price squeeze" in the electric utility industry as an element of the Sherman Act claims: *City of Groton* v. *Connecticut Light & Power Co.*, Civ. No. 15,609 (D. Conn.); *City of Batavia* v. *Commonwealth Edison Co.*, Civ. No. 76-C-4388 (N.D. Ill.); *Cities and Villages of Plymouth* v. *Wisconsin Power & Light Co.*, Civ. No. 77-C-223 (W.D. Wis.); *City of Newark* v. *Delmarva Power & Light Co.*, Civ. No. 77-254 (D. Del.); *City of New Castle* v. *Delmarva Power & Light Co.*, Civ. No. 77-296 (D. Del.); *City of Kirkwood* v. *Union Electric Co.*, Civ. No. 77-0947-C (2) (E.D. Mo.); *Borough of Ellwood City* v. *Pennsylvania Power Co.*, Civ. No. 77-145 (W.D. Pa.); *Cities of Anaheim* v. *Southern California Edison Co.*, Civ. No. CV-78-810-MML (C.D. Cal.); *Borough of Lansdale* v. *Philadelphia Electric Co.*, Civ. No. 78-2533 (E.D. Pa.); *City of Anderson* v. *Indiana & Michigan Electric Co.*, Civ. No. F79-0043 (N.D. Ind.).

and at the same time creates a conflict between federal regulatory law and the federal antitrust laws.

We need not question this Court's holding in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), that electric utilities are generally subject to the antitrust laws. Indeed we rely in part upon that portion of *Otter Tail* which holds that, while a utility may be compelled under the antitrust laws to make its power lines available to municipal utility systems, it is the Federal Commission which has jurisdiction to determine the rates to be charged for such service. 410 U.S. at 375-77. We rely as well upon this Court's related holding, in *FPC* v. *Conway Corp.,* 426 U.S. 271 (1976), that the Federal Commission has jurisdiction to consider antitrust principles, and must do so in its rate making activities, when allegations are made of a "price squeeze" between federal and state rates.

One of the fundamental questions which this case raises is whether a federal court exercising antitrust jurisdiction may involve itself in a determination of the appropriateness of a utility's rates, in view of the Federal Commission's jurisdiction over the level of those rates and over "price squeeze" allegations.

Fundamental also is the question of the extent to which the usual principles of antitrust law may properly be applied in a Section 2 case when the violation alleged arises from a utility's regulated rates. The well-known indicium of "[m]onopoly power is the power to control prices or exclude competition." *United States* v. *Grinnell Corp.,* 384 U.S. 563, 571 (1966), quoting *United States* v. *E. I.*

du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). It should be clear beyond cavil that regulation of a utility's rates precludes the possibility that it has the power to control price within the usual antitrust meaning of those words. And it is equally true that, by reason of federal and state regulation, I&M cannot be said to have the power to exclude competitors in the usual sense. (Indeed it is the Municipalities which have the power to exclude I&M from serving ultimate customers within or near their boundaries.*) That at least some special care and caution should be taken in applying antitrust principles to the electric utility industry was recognized in *Utility Users League* v. *FPC*, 394 F.2d 16 (7th Cir.), *cert. denied*, 393 U.S. 953 (1968), which described the industry as one in which "restraints on competition are not only tolerated, but encouraged." *Id.* at 19.

The court below acknowledged that there "is some substance to [I&M's] regulatory argument" (18a); that it is "the diverse [federal and state] regulatory procedures which preclude parity between wholesale and retail rates" (18a); that any utility subject to dual regulation "may find itself in a legal and practical maze" (18a); and that its resolution of the case did "not render a totally satisfying result" (8a).

But what the court below failed to recognize is that the nature of a regulated "monopoly" calls for a narrower rather than a broader application of the antitrust laws and that a utility should be entitled *a fortiori* to the protection

* Any Indiana municipality which wishes to expand the area served by its utility or to take over service to any I&M customers within its boundaries has statutory power to do so by condemning I&M's utility property serving those customers. Ind. Code Ann. §8-1-2-94 (Burns 1973).

of the *Noerr-Pennington* and "state action" doctrines with respect to its rate petitions. The court below equally failed to recognize that *Otter Tail* and *Conway,* far from mandating antitrust liability for a perceived violation of the Federal Power Act, preclude the ritual application of antitrust principles to disputes involving regulated rates. The Seventh Circuit's expansive view of the application of the antitrust laws to the rates of the regulated electric utility industry led inexorably to its failure to perceive that the congressionally mandated remedy of refund must be considered an exclusive remedy in a dispute involving the appropriateness of the federal rate. The use of the Sherman Act to accomplish rate reductions by indirection is an unwarranted interference with the policy of the Federal Power Act, which assigns to the Federal Commission exclusive jurisdiction to set just and reasonable rates.

The argument that follows demonstrates that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned a departure by the district courts which will consider numerous similar pending cases, as to call for the exercise of this Court's power of supervision.

I

The denial of First Amendment protection to non-sham rate relief petitions warrants correction by this Court.

The filing of a petition constitutes the sole avenue designated by Congress for an electric utility to obtain rate relief. Federal Power Act §205(d), 16 U.S.C. §824d(d) (Supp. II 1978). This Court held in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), that petitions to government are insulated by the First Amendment from antitrust attack, regardless of their purpose or intent. The sole exceptions are "mere sham" petitions, defined as those which (a) do not reflect a "genuine" effort to obtain the relief sought *and* (b) are intended instead to injure competitors directly.*

Mishawaka II recognizes that I&M's rate petitions were not "sham":

> *The "mere sham" exception standing alone does not apply to this case.* The trial court did not find that the federal tariff filings were "mere sham," but found instead that the utility filed for *the highest rate it thought it could justify* without any regard for the adverse competitive impact the new wholesale rate would have . . . .

13a (emphasis added). That conclusion, we submit, should have ended the inquiry and mandated dismissal of the "price squeeze" and "overcharge" claims. The finding

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* *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight Inc.*, 365 U.S. 127, 144 (1961); *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511-15 (1972).

that I&M sought only the rate levels it believed it could justify precludes any determination that the filings were not genuine efforts to influence government. *See Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. at 144. Similarly, the finding that I&M's rate petitions were made without regard to anticompetitive considerations precludes any determination that the filings were made for the purpose of directly inflicting injury on competitors. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972). The several Courts of Appeals have routinely applied that two-pronged test.*

Nevertheless, *Mishawaka II* asserts that I&M's petitions, although not sham, may be amalgamated with other acts to create an antitrust violation.** A jury charge to that precise effect was expressly held by this Court to be reversible error:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, *either standing alone or as part of a broader scheme itself violative of the Sherman Act.*

United Mine Workers v. *Pennington*, 381 U.S. at 670 (emphasis added).

A second ground offered in *Mishawaka II* for denying *Noerr-Pennington* protection to I&M's rate filings is the

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* *E.g., Miracle Mile Assocs.* v. *City of Rochester*, 617 F.2d 18, 20-21 (2d Cir. 1980); *Mark Aero, Inc.* v. *Trans World Airlines, Inc.*, 580 F.2d 288, 295, 297 (8th Cir. 1978); *Subscription Television, Inc.* v. *Southern California Theatre Owners Ass'n*, 576 F.2d 230, 233 (9th Cir. 1978); *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670, 674 (10th Cir. 1977).

** "Considering the *combination of those utility activities* this case is not precluded by *Noerr-Pennington*." 17a (emphasis added).

theory that, by filing its 1976 petition before the Federal Commission had ruled on its 1972 petition, and by filing its 1978 petition before the Federal Commission had ruled on its 1976 petition, I&M was making "baseless, repetitive" claims which denied the Municipalities meaningful access to the Federal Commission, within the meaning of *California Motor Transport*. 16a. That case (which established the principle that the *Noerr-Pennington* doctrine is applicable to administrative petitions) held that the assertion of "baseless, repetitive" claims, instituted " 'with or without probable cause, and regardless of the merits of the cases' " as "pretexts" to injure competitors directly, may be sham activity outside the protection of the First Amendment. 404 U.S. at 512-15.

The 1976 and 1978 filings cannot, however, be "repetitive" acts constituting abuse of the administrative process within the meaning of *California Motor Transport* or in any other sense, since (a) I&M has sought only three rate increases during the twelve inflation-ridden years in which its rates to the Municipalities have been federally regulated; (b) it is not claimed, and cannot be claimed, that I&M was in any way responsible for the long delay encountered in the regulatory proceedings; (c) it has been found that I&M's filings were not sham; and (d) far from being meritless "pretexts" for inflicting anticompetitive injury, it has been found that I&M's filings sought no more than I&M believed it could justify. By stripping I&M of its First Amendment right to petition on the ground that its rate petitions were "repetitive," the Seventh Circuit has imposed a judicial requirement that Congress has declined to adopt, and has limited the permissible frequency of filings in a manner more stringent than Congress has even considered.

In 1977, Congress rejected an amendment to the Federal Power Act which would have required the Federal Commission to act on rate increase filings within ten months, during which time the filing utility would not have been permitted to seek additional rate relief. H.R. 8444, 95th Cong., 1st Sess. §543 (1977). *Cf.* Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617 §207(b)(2), 92 Stat. 3142 (1978). The Seventh Circuit thus premised antitrust liability and denial of *Noerr-Pennington* protection on a sequence of rate petitions that were and would have remained permissible even under the amendment that Congress declined to enact.

With respect to the "price squeeze" claims, the Seventh Circuit declined to apply the *Noerr-Pennington* doctrine on the additional ground that I&M's rate petitions had violated Section 205 of the Federal Power Act under the Seventh Circuit's interpretation of *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976). 15a-16a. That interpretation, with which we disagree (*see* pp. 27-28 *infra*), does not provide a ground for denying *Noerr-Pennington* protection. In *Noerr*, this Court held that, so long as petitions are genuinely intended to influence government, they are protected by the First Amendment, even though the petitions are "vicious, corrupt and fraudulent" and made solely for anticompetitive purposes. 365 U.S. at 138-40. The result in *Mishawaka II* contravenes the First Amendment without serving the antitrust laws. It is of extreme importance to all regulated electric utilities that this Court announce that *Noerr-Pennington* is as applicable to their petitions for rate relief as it is to the petitions to government of all other citizens. *Cf. Consolidated Edison Co.* v. *Public Service Commission*, 48 U.S.L.W. 4776 (June 20, 1980); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 48 U.S.L.W. 4783 (June 20, 1980).

II

The "overcharge" theory of antitrust liability newly created by the court below conflicts with the rate-making process under the Federal Power Act.

Mishawaka II proceeds on the theory that whenever the Federal Commission sets the just and reasonable rate at a level below the rate sought and collected subject to refund, the difference is a "monopolistic overcharge." 27a. Moreover, the antitrust court need not wait for the Federal Commission to set the "just and reasonable" rate, but may "estimate" what that rate might turn out to be. 28a.

Under time-honored principles of administrative law, the "just and reasonable" rate cannot be used as a standard for determining the existence of a "monopolistic overcharge" under the antitrust laws. "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint"; it is a rate-making concept cognizable only in its regulatory context. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). Accordingly, "[j]udicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review." *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 670 (1963). It is well-settled that:

> [A party] cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise

> of the Commission's judgment, in which there is some considerable element of discretion. *It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission,* and not even a court can authorize commerce in the commodity on other terms.

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. at 251 (emphasis added).

The "monopolistic overcharge" theory announced in *Mishawaka II* would cast a wide net. Numerous federal regulatory statutes provide for proposed rates to be collected subject to refund.* The theory of liability fashioned by the Seventh Circuit threatens all such regulatory schemes.

Specifically, *Mishawaka II* disrupts the regulatory balance of the Federal Power Act by effecting a drastic redistribution of the burdens allocated by Congress between the electric utility and its customers. The Federal Power Act provides that proposed rates become effective after specified periods of notice and suspension. Federal Power Act §205(d), (e); 16 U.S.C. §824d(d) (Supp. II 1978), 16 U.S.C. §824d(e) (1976). If the Federal Commission does not approve the full amount of the proposed rate, the remedy prescribed by Congress is a refund with interest. Federal Power Act §205(e); 16 U.S.C. §824d(e) (1976). That scheme reflects a purposeful balancing of interests by Congress between the customer's private interest in paying just and reasonable rates and the public interest

* *E.g.*, 49 U.S.C.A. §10708(b) (Supp. 1979) (Revised Interstate Commerce Act of 1978); 15 U.S.C. §717(c) (1976) (Natural Gas Act); 47 U.S.C. §204(a) (1976) (Federal Communications Act).

in the financial soundness of public utilities. *See United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103, 113-14 (1958) (Natural Gas Act); *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 392 (1959) (Natural Gas Act); *T.I.M.E., Inc.* v. *United States,* 359 U.S. 464, 479-80 (1959) (Motor Carrier Act).

Sound rate regulation depends upon the initiative of utilities in seeking timely and adequate rate relief. *See Georgia* v. *Pennsylvania Railroad,* 324 U.S. 439, 459 (1945); *City of Cleveland* v. *FPC,* 525 F.2d 845, 855 (D.C. Cir. 1976). The Federal Commission cannot grant a rate higher than the rate proposed by the utility; a utility that petitions for a rate increase less than it believes to be its entitlement loses for all time the revenues it has foregone, because the Federal Commission lacks retroactive rate-making power. *East Tennessee Natural Gas Co.* v. *FERC,* 20 F.P.S. 6-44, 6-52 (D.C. Cir. 1980); *City of Piqua* v. *FERC,* 610 F.2d 950, 954 (D.C. Cir. 1979). The decisions below thus create a sharp and irreconcilable conflict between the Sherman Act and the federal rate-making scheme by upsetting the balance of interests created by Congress in the Federal Power Act. That repugnancy between the Federal Power Act and court-ordered rate-making under the Sherman Act effects an implied repeal of the Sherman Act. *See Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975); *United States* v. *National Association of Securities Dealers,* 422 U.S. 694 (1975). *Cf. Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, 436-37 (1907).

The Seventh Circuit has concluded that delay in the regulatory process leads to long periods of "unregulated"

rates during which the proposed rates are collected subject to refund (16a), and found in that circumstance a proper role for Sherman Act relief. The test of conflicting regulation, however, turns upon the existence of authority to regulate particular acts, not upon judicial approval of the efficiency with which that authority is administered. In *Gordon,* this Court held that the SEC's naked power over fixed rates on brokerage commissions was inconsistent with district court jurisdiction over the antitrust implications of those rates; an implied repeal of the Sherman Act was therefore required to make the regulatory system work. 422 U.S. at 685-86, 691. In *National Association of Securities Dealers,* this Court ruled that the SEC's regulatory authority over the fixed resale prices of certain securities "displaces" the federal antitrust laws, even though the SEC had never formulated any rule or regulation governing those prices. An implied repeal of the antitrust laws was deduced from the "substantial danger that appellees would [otherwise] be subjected to duplicative and inconsistent standards" (426 U.S. at 735), a "plain repugnancy" between the regulatory scheme and the application of the antitrust laws.

The error below that engenders the most far-reaching dislocation of the regulatory process is the implicit assumption that *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), and *FPC* v. *Conway Corp.,* 426 U.S. 271 (1976), mandated that the federal courts exercise antitrust jurisdiction over the rate petitions and regulated rates of electric utilities. To the contrary, we read those decisions as reflecting a careful avoidance of any interference with the

Federal Commission's jurisdiction over rates. *Conway* directed the Federal Commission to "consider" price squeeze allegations, but affirmed the jurisdiction of that agency—not of the courts—to reduce federal rates, within the zone of reasonableness, in order to serve competitive ends.* 426 U.S. at 278-79. Even the Federal Commission may not require a rate below the zone of reasonableness, since that would be confiscatory and therefore unconstitutional. *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U.S. 679, 690-95 (1923). The decision below thus permits the use of treble damages under the antitrust laws to effect by indirection that which cannot be done directly under the federal regulatory scheme.

The effectiveness of regulatory procedures requires that the demarcation of responsibility for rate-making be clear and sharp. *Cf. Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976) (utility's light-bulb exchange program not central to regulatory scheme). The Seventh Circuit has here crossed the line carefully marked by this Court; in the absence of any determination by the Federal Commission, the Seventh Circuit impermissibly authorized the district court, on remand, to "estimate" what the Federal Commission might determine the 1976-78 refund to be. 28a. *Cf. Arrow Transportation Co.* v. *Southern Railway Co.,* 372 U.S. 658, 671 (1963). The Federal Commission's decision on the 1976 rate case, issued shortly after *Mishawaka II,* represents an acid commentary on the conjectures that gov-

* The injunction upheld in *Otter Tail* explicitly provided that the utility "shall not be compelled" to provide transmission services "except at rates which are compensatory and under terms and conditions which are filed with and subject to approval by the Federal Power Commission." 410 U.S. at 375.

erned the liability findings in both courts below and highlights the necessity for corrective supervision by this Court.*

If allowed to stand, the decisions below will open the federal courts for the resolution of a whole new series of elaborate and burdensome problems, which have previously been properly considered to be within the province of legislatures and regulatory agencies. Existing federal and state regulatory legislation provides adequate enforcement mechanisms without the federal courts having to assume fresh, unaccustomed and extremely time-consuming burdens.

III

The "price squeeze" theory adopted below exceeds the Sherman Act jurisdiction of the federal courts.

Mishawaka I upheld subject matter jurisdiction on a "price squeeze," not an "overcharge," theory. The premise of *Mishawaka I* was that a utility could injure competitors paying a federal rate either by artificially inflating its federal rate petitions or by artificially depressing its state rate petitions. 165a-169a.

On a motion to dismiss, *Mishawaka I* failed to recognize the exclusivity of the statutory refund remedy and the constitutional right to a compensatory rate by holding that

* Computations based on the Federal Commission's post-*Mishawaka II* ruling in the 1976 rate case reflect that I&M will retain, as just and reasonable, over 96% of the charges collected during the 1976-78 damage period on which both courts focused below. (These computations were made after the Seventh Circuit denied rehearing.) It is inconceivable, we submit, that any utility can be required to predict the just and reasonable rate more accurately, at peril of antitrust liability. It is similarly inconceivable, we submit, that any utility should incur antitrust liability for a "monopolistic overcharge" if the Federal Commission were to disallow a proposed rate increase solely because of technical or legal grounds totally unrelated to competitive considerations.

Sherman Act *jurisdiction* may be required to remedy fully a "price squeeze" created by such rate manipulation. *Mishawaka II* went further and sustained "price squeeze" *liability* even though (a) there is no finding that I&M artificially inflated its federally-regulated rates, and (b) "[t]here is no suggestion that [I&M] deliberately depressed its [state-regulated] rates to create a price squeeze . . ." 28a n.16. Indeed, *Mishawaka II* further found that "a substantial portion of the disparity between [I&M's federal and state] rates apparently arises from the fact that the utility did not receive favorable consideration by the state commissions on several of its [state] rate filings." 28a n.16. Any remaining difference presumably arises from the inconsistent bases on which federal and state rates must be computed, inconsistencies which bar any assumption that those rates should be equal. 26a-27a, 18a.

Those findings should also have precluded liability under the state action principle enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. On I&M's petition for review of *Mishawaka I*, the Solicitor General observed that, "if the alleged price squeeze resulted solely from a state agency's reduction of the utility's proposed [state-regulated] retail rates, the squeeze might be attributable to state rather than private action." Amicus Brief at 14 n.5 (No. 77-689). As *Mishawaka II* concedes, the "[a]nticompetitive effects from [a substantial] portion of the price squeeze, absent evidence that [I&M] deliberately depressed its [state-regulated] retail rates, must be attributed to the state regulatory commissions and not to the utility." 28a n.16. Since the state action reducing I&M's proposed rates was taken pursuant to regulatory schemes that are "clearly articulated and affirmatively expressed as state policy," and "actively supervised" by the States

of Indiana and Michigan, any "price squeeze" created by the reduction in state rates is immune from antitrust attack. *See California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 100 S.Ct. 937, 943 (1980); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (Brennan, J., concurring).

Moreover, the only evidence at trial that a "price squeeze" ever existed was a schedule comparing billings under various federal and state rates, upon which the Municipalities relied to establish both "price squeeze" liability and damages. *Mishawaka II* vacated the damage award predicated on that schedule because the various rates utilized therein reflected "different accounting practices," "different formulae and criteria" for rate determination and "in all likelihood, . . . dissimilar fixed and variable cost requirements" (26a); the Seventh Circuit expressly recognized that the district court's assumption that such rates should have been "equivalent" was "totally without foundation" for damage computation purposes. 27a. That recognition should have mandated dismissal of the "price squeeze" claim, because liability as well as damages hinged on that same flawed evidence. Evidence insufficient even to support an award of antitrust damages cannot as a matter of law satisfy the more difficult burden of establishing antitrust liability. 25a. *See Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

Having found that I&M did not manipulate any of its petitions for rate relief, and having properly rejected the Municipalities' only evidence of a rate disparity, *Mishawaka II* in effect predicates "price squeeze" *liability* on the ground that I&M violated an implied obligation under the Federal Power Act to govern its federal rate filings by

the rates established by the State Commissions. 19a-20a. The antitrust court thus purports to amend the Federal Commission's filing requirements. Even the revised rate increase filing regulations adopted by the Federal Commission in May 1980 and effective later this year (FERC Docket No. RM79-64) do not reflect the alleged "obligation" of a utility to tailor federal rate filings to the cut of the state rates. The obligation that I&M is said to have breached was articulated for the first time in the district court's decision imposing Sherman Act liability.* This notion has now been adopted in *Mishawaka II,* which stands, unless reversed, as the sole federal appellate guide to electric utilities faced with the need to seek rate relief.

In that light, the Seventh Circuit's "price squeeze" and "overcharge" analyses emerge as no more than a vehicle for an impermissible judicial reduction in federally regulated electric rates by way of treble damages under the antitrust laws. That reduction would occur irrespective of the *bona fides* of the utilities' petitions for rate relief and of the roles of both the Federal and State Commissions in setting just and reasonable rates. The intervention of this Court is required to define the extent, if any, to which the Sherman Act is applicable to the rates of electric utilities caught in what *Mishawaka II* described as the "maze" of dual regulation. *See* 18a.

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* The district court's ruling therefore represents an "avulsive change" in the law from which no liability should be held to arise. *See Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 499 (1968). By this change, the courts below have attempted to create a private right of action to enforce Section 205 of the Federal Power Act, by which individual customers may seek review in a federal district court of a utility's compliance with the Federal Power Act (*see* 13a-14a), using the Clayton Act's treble damage provision as an enforcement mechanism. Such a procedure is flatly contrary to the Act itself, which grants enforcement powers to the Federal Commission and to no one else. Federal Power Act §314(a), 16 U.S.C. §825m (1976). *See Cannon* v. *University of Chicago,* 441 U.S. 677, 690 n.13 (1979).

IV

The Seventh Circuit's award of treble damages for litigation expenses before the Federal Commission contravenes the "American Rule" that attorney's fees are not recoverable absent an explicit statutory provision.

The Seventh Circuit, reversing the district court, has remanded for a treble damage assessment the Municipalities' litigation expenses in a proceeding they commenced before the Federal Commission. 31a-32a. In that proceeding, the Municipalities challenged I&M's curtailment plans and its refusal to renew their long-term, full-requirements contracts (though offering to continue service) during a period in which I&M was experiencing a shortage of generating capacity. The Federal Commission has not decided that controversy, and Congress has subsequently enacted legislation specifically covering such a situation. Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617 §206(a), 92 Stat. 3141 (1978).

Apart from the manifest impropriety of awarding litigation expenses (let alone trebling them) in an undecided case (*see Hanrahan* v. *Hampton,* 40 S.Ct. Bull. [CCH] B2666 [June 2, 1980]), the Seventh Circuit's decision is in derogation of the American Rule on attorney's fees, as reaffirmed in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). *See Roadway Express, Inc.* v. *Piper,* 48 U.S.L.W. 4836 (June 23, 1980). Absent specific statutory provisions permitting an award of attorney's fees, Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs *or otherwise* whenever the courts might deem them warranted." 421 U.S. at 260 (emphasis added).

The federal courts have generally followed that principle in antitrust cases, except for *defensive* litigation expenses that have been awarded as antitrust damages in the unique patent-antitrust context. *See, e.g., Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952). The Seventh Circuit's determination, which permits a party to establish antitrust injury and damages solely on the basis of litigation expenses voluntarily incurred in bringing administrative proceedings, represents an unwarranted departure from the American Rule and creates a dangerous treble-damages incentive to commence such proceedings, thus creating an exception which swallows the American Rule set forth in *Alyeska*.

Conclusion

For all the foregoing reasons, Petitioners respectfully submit that the errors inherent in *Mishawaka I* and *Mishawaka II* warrant correction by this Court and the issuance of a Writ of Certiorari to the Seventh Circuit.

Respectfully submitted,

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